

67  
No 96-827

Supreme Court, U.S.

FILED

AUG 14 1997

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,

*Petitioner,*

v.

PATRICIA BRITTON,

*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**BRIEF OF AMICUS WILLIAM G. MOORE, JR. AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

JAMES E. ANKLAM  
DANIEL H. BROMBERG  
(*Counsel of Record*)  
JONES, DAY, REAVIS & POGUE  
1450 G Street, N.W.  
Washington, D.C. 20005  
(202) 879-3939

PAUL MICHAEL POHL  
IRA L. PODHEISER  
JONES, DAY, REAVIS & POGUE  
One Mellon Bank Center  
31st Floor  
Pittsburgh, PA 15219  
(412) 391-3939

*Counsel for Amicus Curiae  
William G. Moore, Jr.*

23 p/p

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION AND SUMMARY .....	3
ARGUMENT .....	5
I. THE PLURALITY'S WEIGHING OF THE COSTS AND BENEFITS OF UNCONSTITUTIONAL MOTIVE CASES IS FLAWED .....	5
A. The Public Has a Compelling Interest in Holding Public Officials Accountable for Their Tortious Conduct .....	5
1. The Public Has a Strong and Well- Established Interest in Holding Public Officials Personally Accountable for Their Tortious Conduct .....	6
2. The Public's Interest in Holding Public Officers Personally Accountable Is Especially Strong in Cases of Unconsti- tutional Motive .....	8
B. The Clear-and-Convincing Evidence Standard Is Not Needed to Screen Out Frivolous Unconstitutional Motive Claims .....	11
II. CONGRESS DID NOT INTEND TO EXTEND NEW IMMUNITIES TO PUBLIC OFFICIALS ACCUSED OF ACTING WITH AN UNCONSTITI- TUTIONAL MOTIVE .....	15
CONCLUSION .....	18

No counsel for any party had any role in authoring this brief, and no person other than the named *amicus* and his counsel made any monetary contribution to its preparation and submission.

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) . . . . .	12, 15
<i>Anderson v. Liberty Lobby Inc.</i> , 477 U.S. 242 (1986) . . . . .	14
<i>Bivens v. Six Unknown Federal Narcotics Agents</i> , 403 U.S. 388 (1971) . . . . .	6
<i>Blue v. Koren</i> , 72 F.3d 1075 (2d Cir. 1995) . . . . .	15
<i>Board of County Comm'rs v. Umbehr</i> , 116 S. Ct. 2342 (1996) . . . . .	9
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993) . . . . .	16
<i>Butz v. Economou</i> , 438 U.S. 478 (1978) . . . . .	<i>passim</i>
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989) . . . . .	9
<i>Clinton v. Jones</i> , 117 S. Ct. 1636 (1997) . . . . .	11
<i>Crawford-El v. Britton</i> , 93 F.3d 813 (D.C. Cir. 1996) (en banc) . . . . .	<i>passim</i>
<i>DiMeglio v. Haines</i> , 45 F.3d 790 (4th Cir. 1995) . . . . .	12
<i>Dunlop v. Munroe</i> , 11 U.S. (7 Cranch) 242 (1812) . . . . .	6
<i>Elder v. Holloway</i> , 114 S. Ct. 1019 (1994) . . . . .	7
<i>Elliott v. Thomas</i> , 937 F.2d 338 (7th Cir. 1991), cert. denied, 502 U.S. 1121 (1992) . . . . .	14
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976) . . . . .	9
<i>Gehl Group v. Koby</i> , 63 F.3d 1528 (10th Cir. 1995) . . . . .	13, 14
<i>Gooden v. Howard County</i> , 954 F.2d 960 (4th Cir. 1991) . . . . .	15
<i>Grant v. Pittsburgh</i> , 98 F.3d 116 (3d Cir. 1996) . . . . .	13, 14
<i>Great Northern Life Insurance Co. v. Read</i> , 322 U.S. 47 (1944) . . . . .	8
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) . . . . .	3, 5, 6, 8, 10
<i>Hill v. Shelandar</i> , 992 F.2d 714 (7th Cir. 1993) . . . . .	14
<i>Landstrom v. Illinois Dept. of Children and Family Services</i> , 892 F.2d 670 (7th Cir. 1990) . . . . .	12
<i>Lane v. Wilson</i> , 307 U.S. 268 (1939) . . . . .	16
<i>Lindsey v. Shalmy</i> , 29 F.3d 1382 (9th Cir. 1994) . . . . .	14

## TABLE OF AUTHORITIES (cont'd)

	Page
<i>Little v. Barreme</i> , 6 U.S. (2 Cranch) 170 (1804) . . . . .	6
<i>Lovelace v. Delo</i> , 47 F.3d 286 (8th Cir. 1995) . . . . .	12
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986) . . . . .	4, 15
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) . . . . .	6
<i>Maxey By Maxey v. Fulton</i> , 890 F.2d 279 (10th Cir. 1989) . . . . .	12
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) . . . . .	11
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961) . . . . .	4, 16
<i>Moore v. Valder</i> , 65 F.3d 189 (D.C. Cir. 1995), cert. denied, 117 S. Ct. 75 (1996) . . . . .	2
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977) . . . . .	9
<i>Nixon v. Condon</i> , 286 U.S. 73 (1932) . . . . .	16
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980) . . . . .	16
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972) . . . . .	9
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) . . . . .	4, 10, 15
<i>Schultea v. Wood</i> , 47 F.3d 1427 (5th Cir. 1995) (en banc) . . . . .	12, 14
<i>Siegert v. Gilley</i> , 500 U.S. 226 (1991) . . . . .	3
<i>Slaughter House Cases</i> , 83 U.S. (16 Wall.) 36 (1873) . . . . .	16
<i>Tenney v. Brandhove</i> , 341 U.S. 367 (1951) . . . . .	15
<i>Tower v. Glover</i> , 467 U.S. 914 (1984) . . . . .	15
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144 (1938) . . . . .	9
<i>United States v. Lee</i> , 106 U.S. 196 (1882) . . . . .	6
<i>United States v. Recognition Equipment Inc.</i> , 725 F. Supp. 587 (D.D.C. 1989) . . . . .	2
<i>Unwin v. Campbell</i> , 863 F.2d 124 (1st Cir. 1988) . . . . .	12
<i>Veney v. Hogan</i> , 70 F.3d 917 (6th Cir. 1995) . . . . .	14
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) . . . . .	8

## TABLE OF AUTHORITIES (cont'd)

	Page
<b>Statutes and Rules</b>	
Civil Rights Act of 1871, ch. 22, 17 Stat. 13 . . . . .	16
Fed. R. Civ. P. 56(e) . . . . .	12
<b>Miscellaneous Authorities</b>	
George A. Bermann, <i>Integrating Governmental and Officer Tort Liability</i> , 77 Colum. L. Rev. 1175 (1977) . . . .	6
Alexander Bickel, <i>The Morality of Consent</i> (1975) . . . . .	9
Thomas M. Cooley, <i>The General Principles of Constitutional Law in the United States of America</i> (3d ed. 1898) . . . . .	10
Declaration of Independence, para. 12 (U.S. 1776) . . . . .	7
Albert v. Dicey, <i>Law of the Constitution</i> (6th ed. 1902) . . . .	6
Jerry L. Mashaw, <i>Civil Liability of Government Officers: Property Rights and Official Accountability</i> , 42 Law & Contemp. Probs. 7 (1978) . . . . .	7
Christopher B. Mueller & Laird C. Kirkpatrick, <i>Modern Evidence: Doctrine &amp; Practice</i> § 3.7 (1995) . . . . .	13
David Rudovsky, <i>The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights</i> , 138 U. Penn. L. Rev. 23 (1989) . . . . .	12
1A Martin A. Schwartz & John E. Kirklin, <i>Section 1983 Litigation: Claims and Defenses</i> § 3.11 (1997) . . . . .	9
Marshall S. Shapo, <i>Constitutional Tort: Monroe v. Pape and the Frontiers Beyond</i> , 60 Nw. U. L. Rev. 277 (1965) . . . . .	16
Joseph Story, <i>Commentaries on the Law of Agency</i> § 320 (1869) . . . . .	6, 7

INTEREST OF AMICUS CURIAE<sup>1</sup>

William G. Moore, Jr. is the former chairman and chief executive officer of Recognition Equipment Incorporated ("REI"). REI was closely involved in the decision of the United States Postal Service in the early 1980s to introduce optical scanning technology to improve the Service's performance. At that time, Moore was an outspoken critic of the Postal Service's ill-considered and since-reversed decision to use single-line technology rather than multiple-line scanners of the sort produced by REI. Partly as a result of Moore's public criticism and lobbying of Congress, several high ranking Postal Service officials were dismissed.

Several years later, after an investigation by Postal Service inspectors, Moore was charged with involvement in a conspiracy relating to kickbacks at the Service. Moore's only connection to the scheme was REI's retention, on unrelated business, of a consulting firm involved the scheme. Although none of the participants in the conspiracy said that Moore was involved — indeed, several told postal inspectors that steps had been taken to hide the conspiracy from him — the postal inspectors and the prosecutor in charge of the investigation nevertheless attempted to connect Moore to the scheme. As the subsequent trial disclosed, in order to obtain an indictment, the postal inspectors and prosecutor engaged in shocking acts of deliberate misconduct.<sup>2</sup> After the government presented its case for six weeks,

<sup>1</sup> Counsel for petitioner and respondent have consented to the filing of this brief *amicus curiae*. Their consent letters are on file with the Clerk of the Court.

<sup>2</sup> Among other things, the postal inspectors and the prosecutor (1) intimidated and harassed a key witness into withdrawing exculpatory testimony; (2) presented in lieu of live testimony witness statements that were inaccurate, incomplete, and often simply false; (3) refused to permit one witness either to correct his statement or to present testimony to the grand jury that would remove the misleading impression created by the statement; (4) asked questions before the grand jury based upon factual premises known to be false; (5) knowingly concealed exculpatory evidence; (6) disclosed secret grand jury testimony to certain witnesses in order to influence their testimony; and (7) falsified records of witness

the trial court dismissed the charges as baseless. *See United States v. Recognition Equip. Inc.*, 725 F. Supp. 587 (D.D.C. 1989). Nevertheless, Moore suffered grievous injury to his reputation, to his career, and to his personal life from this unfounded prosecution.

In November 1991, based upon evidence that his prosecution was in retaliation for his outspoken criticism of the Postal Service, Moore sued the postal inspectors and the prosecutor for violating his constitutional rights. On September 22, 1995, a unanimous panel of the D.C. Circuit upheld Moore's claim of retaliatory prosecution against the postal inspectors' defense of qualified immunity. *See Moore v. Valder*, 65 F.3d 189, 196 (D.C. Cir. 1995), *cert. denied*, 117 S. Ct. 75 (1996); *see also id.* at 194-95 (rejecting the prosecutor's claims of absolute immunity for investigatory functions). In so doing, the D.C. Circuit expressly held that Moore had satisfied the direct evidence standard then used by the D.C. Circuit. *See id.* at 196.

It has been more than 17 months since the D.C. Circuit issued its mandate in Moore's case. Moore has, however, been unable to conduct discovery because the postal inspectors and the prosecutor in his case have sought reconsideration of their qualified immunity claims based upon the decision below. In Moore's view, the evidence that satisfied the D.C. Circuit's direct evidence pleading standard satisfies whatever new standard *Crawford-El* imposes. The clear-and-convincing evidence standard adopted by the plurality would, however, place Moore at a decided disadvantage at trial. Moore, and all other plaintiffs with meritorious claims based upon unconstitutional motive, therefore have a keen interest in this Court's consideration — and rejection — of that evidentiary standard.

---

interviews to omit exculpatory evidence.

## INTRODUCTION AND SUMMARY

As Justice Kennedy has observed, there is a tension between this Court's attempt in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to purge the qualified immunity doctrine of subjective elements and the requirement for many constitutional violations that a particular purpose, intent or motive be proven. *See Siegert v. Gilley*, 500 U.S. 226, 235-36 (1991) (Kennedy, J., concurring in the judgment). Most lower courts have reconciled this tension by requiring plaintiffs to specify the facts supporting claims of unconstitutional motive and permitting defendants to move for dismissal based upon qualified immunity at that stage. Alone among all these decisions, the plurality opinion in this case went one step further and imposed a heightened evidentiary standard on plaintiffs bringing unconstitutional motive claims. *See Crawford-El v. Britton*, 93 F.3d 813, 821-23 (D.C. Cir. 1996) (plurality op.).

The clear-and-convincing evidence standard adopted by the plurality is not based on any common law antecedent. Nor is it drawn from the decisions of this Court or, for that matter, any other court. In fact, as the plurality conceded, the clear-and-convincing evidence standard was not even advocated by any of the parties before the *en banc* panel. *See Crawford-El*, 93 F.2d at 821 & n.5. The standard emerged instead from the plurality's analysis of the social costs and benefits of unconstitutional motive suits. The plurality does not, however, overcome the "burden of showing that public policy requires an [immunity] of that scope," *Butz v. Economou*, 438 U.S. 478, 506 (1978), for the simple reason that it fails to identify the public interests implicated by the immunity it proposes.

First, the plurality assumes that the net social costs of litigating claims unsupported by any clearly established right, which this Court considered in *Harlow*, are equivalent to costs of litigating cases in which an unconstitutional motive must be proven. This is not true. Where there is no clearly established right, the public's interest in holding public officials liable is limited because of the injustice of punishing officials who must exercise

discretion to perform their duties for failing to anticipate what rights courts will establish in the future. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). The public's interest in punishing officials who discriminate on the basis of race, retaliate against the exercise of free speech, or otherwise act with an unconstitutional motive is far stronger. There is, moreover, nothing unfair about allowing plaintiffs to recover damages from public officials who discriminate on the basis of race or retaliate against the exercise of free speech. To the contrary, the public has a compelling interest in punishing public officials who so flagrantly abuse their office.

Second, the plurality asserts without any real analysis that unfounded claims of unconstitutional motive cannot be screened out effectively without a heightened standard of proof. As other circuits considering the issue have found, this is not so. Few, if any, unfounded claims will be able to survive dispositive motions made prior to discovery — especially if public officials who have acted in an objectively reasonable manner are permitted a presumption of good faith.

Finally, and most fundamentally, the plurality ignores the proper role of the courts in determining the nature and scope of official immunity. The role of courts is "to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986); *see also Butz v. Economou*, 438 U.S. at 504 (noting that immunities in *Bivens* actions are co-extensive with those under § 1983). The plurality does not, however, even inquire into Congress' intent. Congress could not have intended to expand traditional immunities to include the clear-and-convincing evidence standard proposed by the plurality below. Section 1983 was enacted in 1871 in large part to protect the rights of former slaves and more generally to provide a federal remedy against official misconduct. *See Monroe v. Pape*, 365 U.S. 167, 172-74 (1961). An immunity doctrine that offers special protections to public officials who discriminate on the basis of race or retaliate against others for exercising constitutional rights would undermine these purposes and must therefore be rejected.

## ARGUMENT

### I. THE PLURALITY'S WEIGHING OF THE COSTS AND BENEFITS OF UNCONSTITUTIONAL MOTIVE CASES IS FLAWED.

Two factors led the plurality to require proof of unconstitutional motive by clear and convincing evidence in order to overcome a public official's qualified immunity. *See Crawford-El v. Britton*, 93 F.3d at 821 (plurality op.). First, relying upon this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, the plurality asserted that the "costs of error in the grant or denial of relief in such cases was asymmetrical." *Crawford-El*, 93 F.3d at 821. Second, the plurality asserted that even without discovery plaintiffs would "often be able to depict a selective pattern of decisions that . . . will look fishy enough" to get them past summary judgment. *Id.* This reasoning does not even begin to satisfy the burden that must be borne to justify an expansion of official immunity, *see Butz*, 438 U.S. at 506, because, as shown below, it is based upon unjustified and incorrect assumptions.

#### A. The Public Has a Compelling Interest in Holding Public Officials Accountable for Their Tortious Conduct.

In finding that the costs of litigating unconstitutional motive claims outweigh the costs of denying recovery in such cases, the plurality discussed in some detail the costs of litigating such claims. *See Crawford-El*, 93 F.3d at 821-23. Notably absent from the plurality opinion is any extended analysis of the other half of the equation: that is, the public interest in holding public officials who act with an unconstitutional motive accountable for their tortious conduct. This interest — which implicates not only the rights of victims of official misconduct to compensation, but also the principle of the rule of law — is always strong. Moreover, contrary to the plurality's assumption in relying upon this Court's decision in *Harlow*, the public's interest in holding public officials accountable in unconstitutional motive cases is much stronger than its interest in the types of cases considered in *Harlow*.

**1. The Public Has a Strong and Well-Established Interest in Holding Public Officials Personally Accountable for Their Tortious Conduct.**

At common law, official immunity is the exception, not the rule.<sup>3</sup> The common-law rule that public officials should be held accountable for their torts serves several important interests. This rule ensures that victims of official conduct will be compensated for their injuries. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814 (citations omitted); see also *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 410 (1971) ("For people in *Bivens*' shoes, it is damages or nothing."). However, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Accordingly, this Court early on recognized the importance of compensating victims of official misconduct. See, e.g., *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242 (1812); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

<sup>3</sup> As one scholar has noted, "the common law traditionally did not distinguish between public officials and private individuals for purposes of determining the scope of personal tort liability." George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175, 1178 (1977). Thus, in England, it has long been established that "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Albert V. Dicey, *Law of the Constitution* 189 (6th ed. 1902). The same principle has been applied in the United States. See, e.g., Joseph Story, *Commentaries on the Law of Agency* § 320, at 396 (1869) (noting that public officers "incur the same responsibility, and to the same extent, as private [individuals]"); see also *United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above of the law. No officer of the law may set that law at defiance with impunity.").

The rule that public officials should be held accountable for their tortious conduct also serves to define the role of public officials in a constitutional democracy. First, imposing liability helps to "deter[ ] public officials' unlawful actions." *Elder v. Holloway*, 510 U.S. 510, 515 (1994). More importantly, imposing liability on public officials also vindicates the rule of law.<sup>4</sup> See *Butz v. Economou*, 438 U.S. at 506 ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law"). As Justice Story observed,

[The tort liability of public officers] is founded upon a very plain principle of common sense and common justice; and that is, that no person shall shelter himself from personal liability, who does a wrong, under color of, but without any authority, or by an excess of his authority, or by negligent use or abuse of his authority.

J. Story, *Commentaries on the Law of Agency* § 320, at 396 (1869).

As the role of the government has expanded and the level of litigation in society has risen, courts began to recognize the need to shield government officers from liability for their misconduct in order to ensure the vigorous exercise of public authority. See, e.g., Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 Law & Contemp. Probs. 7, 14 (1978) ("The notion that government officers should be shielded from liability is of relatively recent origin."). This does not, however, mean that the public's interest in official accountability has diminished. The need to compensate innocent victims of official misconduct remains and the importance of the rule of law have not disappeared during this century. If anything,

<sup>4</sup> The Sovereign's abuse of the rule of law formed one of the key grievances in the Declaration of Independence. See Declaration of Independence, para. 12 (U.S. 1776) (protesting the King's "sen[ding] hither swarms of Officers to harass our people and eat out their substance").

the validity of these principles has "gained and not lost." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59 n.2 (1944) (Frankfurter, J., dissenting). Consequently, these concerns have "required the denial of absolute immunity to most public officers," *Harlow*, 457 U.S. at 814, and they require federal officials seeking new immunities to "bear the burden of showing that public policy requires an [immunity] of that scope." *Butz*, 438 U.S. at 506.

## 2. The Public's Interest in Holding Public Officers Personally Accountable Is Especially Strong in Cases of Unconstitutional Motive.

The plurality opinion did not consider directly the public's interest in holding public officers accountable for constitutional violations arising from unconstitutional motive. Instead, the plurality reasoned that this interest was outweighed by the costs of unconstitutional motive suits because in *Harlow* this Court implicitly found that the social costs of litigation outweighed the social costs of denying recovery to meritorious plaintiffs. See *Crawford-El*, 93 F.3d at 821. Hidden in the plurality's reasoning is the assumption that costs of denying recovery in unconstitutional motive suits is equivalent to the costs of denying recovery in the suits considered in *Harlow*. That assumption is incorrect.

The paradigmatic unconstitutional motive claim is discrimination, which can only be established by showing an intent to discriminate. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976). Discrimination, especially by public officials, eats away at the very fabric of a democratic society. As Alexander Bickel recognized,

The lessons of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, and destructive of democratic society.

A. Bickel, *The Morality of Consent* 133 (1975). Discrimination not only injures the individual against whom it is directed; it also can stigmatize entire groups of people and distort the political process. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). Plainly, the public's interest in punishing public officials who engage in discrimination and deterring others from doing so is compelling.

The Constitution also forbids public officials from depriving individuals of government benefits in retaliation for the exercise of their constitutional rights. See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government officials "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); see generally 1A Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* § 3.11, at 208-09 & n.388 (1997). Like discrimination claims, retaliation claims require proof of a motive. See, e.g., *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2352 (1996) (requiring proof that conduct "was motivated by [plaintiff's] speech on a matter of public concern"); see also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (discussing the framework for assessing governmental motive). The public's interest in holding accountable officials who retaliate against the exercise of constitutional rights and deterring such retaliation in the future is especially great. Officials who punish others for exercising their constitutional rights do not simply violate Constitution; they subvert it. For the rule of law to have any practical meaning, public officials who abuse their authority to prevent citizens from exercising their rights must be punished. Thus, in retaliation cases, as well as discrimination cases, the public has a compelling interest in holding public officials who act with an unconstitutional motive accountable for their actions.<sup>5</sup>

<sup>5</sup> There are other types of unconstitutional motive claims as well. For example, plaintiffs alleging Eighth Amendment violations are required to prove deliberate indifference. See *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

*Harlow* considered the immunity recognized at common law for public officials acting in good faith. See *Harlow*, 457 U.S. at 806; *Scheuer v. Rhodes*, 416 U.S. at 240. “[Inferior officers exercising severally a discretionary duty to individuals] are protected when they act in good faith but they are generally held responsible if they take advantage of their position to injure another maliciously and without cause.” Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 174 (3d ed. 1898). This Court held that the scope of this immunity should be judged by the “objective legal reasonableness of an official’s acts.” *Harlow*, 457 U.S. at 819. Thus, under *Harlow*, recovery is denied to meritorious plaintiffs only when an official’s conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 818 (citations omitted). The public’s interest in punishment in these cases is limited. As this Court has recognized, when the law is unclear, there is an “injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position to exercise discretion.” *Scheuer v. Rhodes*, 416 U.S. at 240; see *Harlow*, 457 U.S. at 818. When the law is unclear, an official cannot “fairly be said to ‘know’ that the law forbade conduct not previously identified unlawful.” *Harlow*, 457 U.S. at 818. Moreover, public officials cannot “reasonably be expected to anticipate subsequent legal developments.” *Id.* Thus, while the public interest in punishing public officials who discriminate or otherwise act with an unconstitutional motivation is compelling, the interest in punishing officials under the circumstances considered in *Harlow* is quite limited.

The other purpose served by the qualified immunity doctrine is the “public interest in encouraging the vigorous exercise of official authority.” *Harlow*, 457 U.S. at 807 (quotation omitted); *Scheuer*, 416 U.S. at 240. It is, however, questionable how much public officials who do not and cannot know whether their actions violate a constitutional right can be deterred from violating that right. Their most likely reaction is simply not to act at all. By contrast, where the rules are clear, as with claims of

unconstitutional motive, public officials can easily act and still avoid violating constitutional rights. Moreover, to the extent that public officials hesitate before they act in order to avoid claims of unconstitutional motive, that is good. As this Court has observed, “[w]here an official could be expected to know his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.” *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quotation omitted).

In sum, the public’s interest in holding public officials who act with an unconstitutional motive liable for the injuries they cause is stronger than the interest in holding liable officials who fail to anticipate future legal developments. This in turn means that the social costs of denying recovery in unconstitutional motive cases are higher than the costs of denying recovery in the cases considered in *Harlow*. The plurality therefore erred in applying this Court’s implicit assessment of the costs of error in *Harlow* to the completely different situation presented in this case.

#### **B. The Clear-and-Convincing Evidence Standard Is Not Needed to Screen Out Frivolous Unconstitutional Motive Claims.**

In addition to assuming incorrectly that the costs of error in unconstitutional motive cases are equivalent to the costs in *Harlow*-type cases, the plurality also claims that a clear-and-convincing evidence standard is needed to screen out frivolous claims of unconstitutional motive. See *Crawford-El*, 93 F.3d at 821. Yet this Court recently noted that district courts are well-equipped to deal with frivolous claims, even where discovery is permitted. See *Clinton v. Jones*, 117 S. Ct. 1636, 1651 (1997) (noting that “most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant”). And this Court has noted in the context of qualified immunity that “firm application of the Federal Rules of Civil Procedure will ensure that federal officers are not harassed by frivolous lawsuits.” *Butz v. Economou*, 438 U.S. at 508. It should come as no surprise then that the plurality fails to show why the draconian remedy of

requiring proof by clear-and-convincing evidence is necessary to screen out unfounded claims of unconstitutional motive.

The plurality supposes that "unconstitutional motive is . . . easy to allege and hard to disprove." *Crawford-El*, 93 F.3d at 821. While this may be true, it does not follow that it is easy to survive a summary judgment motion brought prior to discovery. Plaintiffs cannot defeat a motion for summary judgment by pointing to the allegations in their pleadings. *See* Fed. R. Civ. P. 56(e) (A party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleadings."). The party must instead "set forth specific facts" in affidavits or other evidence establishing the alleged motive. *Id.* Most, if not all, plaintiffs with unfounded claims of unconstitutional motive will not be able to surmount this barrier, especially when the motion for summary judgment is brought prior to discovery.<sup>6</sup>

---

<sup>6</sup> This is not, however, to say that discovery should never be permitted in unconstitutional motive case prior to summary judgment. The plurality's suggestion to this effect was rejected by a majority of the court below. *See Crawford-El*, 93 F.3d at 839-41 (Ginsburg, J., concurring in part); *id.* at 849 & n.6 (Edwards, C.J., concurring in remand). It is also inconsistent with the decisions of this Court, which have acknowledged that discovery may be necessary under certain circumstances before a qualified immunity claim can be resolved. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987); *see also* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Penn. L. Rev. 23, 68 (1989) ("[C]ases decided post-*Anderson* recognize the need to resolve certain factual issues in immunity cases."). Not surprisingly, most courts of appeals have permitted limited discovery on issues directly relating to qualified immunity prior to ruling on motions for summary judgment. *See e.g., DiMeglio v. Haines*, 45 F.3d 790, 795 (4th Cir. 1995); *Lovelace v. Delo*, 47 F.3d 286, 287 (8th Cir. 1995); *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc); *Landstrom v. Illinois Dept. of Children and Family Services*, 892 F.2d 670, 674 (7th Cir. 1990); *Maxey By Maxey v. Fulton*, 890 F.2d 279, 282 (10th Cir. 1989); *Unwin v. Campbell*, 863 F.2d 124, 132 n.5 (1st Cir. 1988).

*See Grant v. Pittsburgh*, 98 F.3d 116, 126 (3d Cir. 1996) (noting that summary judgment alone "adequately protects public officials . . . from groundless allegations of 'bad' intent").

Realizing that wholly-unsupported claims would be screened out by summary judgment under any evidentiary standard, the plurality claims that plaintiffs (presumably without meritorious claims) will "often be able to depict a selective pattern of decisions that . . . look fishy enough that a jury could reasonably find illicit motive by a preponderance." *Crawford-El*, 93 F.3d at 821. The plurality does not, however, explain how plaintiffs are likely to obtain evidence of prior decisions, much less concoct a pattern from those decisions, without the benefit of discovery. Further, a plaintiff alleging unconstitutional motive must do more than make an official's motive "look fishy" in order to survive summary judgment; the plaintiff must show a particular, unconstitutional motive, such as an intent to discriminate on the basis of race or an intent to retaliate for a particular statement or action. Few plaintiffs will be able to plausibly assert that, like petitioner, he made public statements critical of the official in question or, like *amicus*, that he was a critic of the agency that improperly investigated him. As a consequence, there is no reason to assume that plaintiffs without meritorious claims will be able to cobble together circumstantial evidence sufficient to prove a motive that is not only "fishy" but unconstitutional as well.

Furthermore, where the actions taken by a public official are objectively reasonable, courts may presume that the official acted in good faith. *Cf. Gehl Group v. Koby*, 63 F.3d 1528, 1535 (10th Cir. 1995) (once defendant shows objective reasonableness, burden shifts to plaintiff to establish subjective motivating animus). Such a presumption would in effect dictate that the objective reasonableness of an official's act is cogent evidence of good faith, requiring the plaintiff to produce similarly cogent evidence in response in order to defeat summary judgment. *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence: Doctrine & Practice* § 3.7, at 199 (1995). As a consequence, even if a plaintiff were somehow able to gather evidence showing a selective pattern of decisions that suggested

an unconstitutional motive, public officials who have acted reasonably would be subject to little risk of discovery and trial.

The plurality's suggestion that unconstitutional motive claims must be subjected to clear-and-convincing evidence in order to screen out frivolous claims finds no support in the decision of other circuits. The Third Circuit recently held that "a heightened summary judgment standard is not only unnecessary, but also undesirable in light of . . . *Anderson v. Liberty Lobby Inc.*, [477 U.S. 242 (1986)]." *Grant v. Pittsburgh*, 98 F.3d at 125-6; see also *Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994). Other circuits impose the limited requirement, either at the pleading stage or at summary judgment, of proffering "specific facts," "particularized evidence" or specific, nonconclusory allegations of unconstitutional motive. *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995); *Gooden v. Howard County*, 954 F.2d 960, 970 (4th Cir. 1991); accord *Veny v. Hogan*, 70 F.3d 917, 921 (6th Cir. 1995); *Shultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc); *Hill v. Shelander*, 992 F.2d 714, 717 (7th Cir. 1993).<sup>7</sup> And the Tenth Circuit places the burden on the official claiming immunity to "make a prima facie showing of the 'objective reasonableness' of the challenged conduct" before a citizen-plaintiff is required to offer the evidence supporting his or her claim of unconstitutional motive. *Gehl Group v. Koby*, 63 F.3d at 1535 (citation and quotation omitted). As Chief Judge Edwards commented, "if a 'clear-and-convincing' evidence standard were truly necessary," surely one of the other circuits to consider unconstitutional motive cases would have recognized it. *Crawford*, 93 F.3d at 851 (Edwards, C.J., concurring in remand).

<sup>7</sup> In an early and influential opinion on this subject, Judge Easterbrook described these standards as requiring plaintiff to have the "kernel of a case in hand." *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), cert. denied, 502 U.S. 1121 (1992).

## II. CONGRESS DID NOT INTEND TO EXTEND NEW IMMUNITIES TO PUBLIC OFFICIALS ACCUSED OF ACTING WITH AN UNCONSTITUTIONAL MOTIVE.

In addition to mistaking the public's interest in unconstitutional motive cases and the need for a clear-and-convincing evidence standard, the plurality also makes a more fundamental error: it misconstrues the role of the courts in shaping official immunity doctrine. The doctrine of official immunity is "essentially a matter of statutory construction." *Butz v. Economou*, 438 U.S. at 497; see *Scheuer v. Rhodes*, 416 U.S. at 243; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). As a consequence, the role of the courts is "to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice." *Malley v. Briggs*, 475 U.S. at 342; see also *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) (Courts "do not have a license to establish immunities from § 1983 actions in the interests of what [they] judge to be sound policy."). This is critical here because, whatever the relative costs and benefits of unconstitutional motive suits may be, there is no reason to think that in passing § 1983 Congress intended to afford public officials a special immunity against claims of unconstitutional motive.

The plurality does not point to, and *amicus* has been unable to find, any common law antecedent for the plurality's clear-and-convincing evidence standard. It is true that the precise contours of official immunity are not "slavishly derived" from the common law. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Nevertheless, courts are "guided in interpreting Congress' intent by common-law tradition." *Malley v. Briggs*, 475 U.S. at 342; see *Tower v. Glover*, 467 U.S. at 920 ("Section 1983 immunities are predicated upon a considered inquiry in the immunity historically accorded the relevant official at common law and the interests behind it.") (quotation omitted). Thus, while this Court may have reformulated the good faith immunity enjoyed by officials at common law into an objective standard in *Harlow*, the fact that there is no common law antecedent for any special immunity for unconstitutional motive torts strongly weighs against finding any congressional intent to recognize such an immunity.

See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 280 (1993) (Scalia, J., concurring) (noting that the "presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language [of § 1983]" (quotation omitted)).

More fundamentally, any immunity that would significantly impede plaintiffs with meritorious claims of discrimination and official abuse of power cannot be reconciled with Congress' purpose in enacting § 1983. Section 1983 was enacted as part of the Civil Rights Act of 1871 to "enforce the Provisions of the Fourteenth Amendment." ch. 22, 17 Stat. 13; see *Monroe v. Pape*, 365 U.S. at 172. As the "pervading purpose" of the Fourteenth Amendment was to "protect[] the newly-made freedman and citizen from the oppression of those who formerly exercised dominion over him," *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873), preventing official discrimination is clearly one of the primary purposes of § 1983.<sup>8</sup> It could not have been Congress' intent to introduce such an immunity *sub silentio*. Expanding immunity for public officials who discriminate is inconsistent with, and inimical to, the very purposes of the statute.

Nor is there any basis for suggesting that Congress intended to introduce a more general protection against claims of unconstitutional motive. The general purpose of § 1983 is to provide a "remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. at 172; see also *Owen v. City of*

*Independence*, 445 U.S. 622, 650 (1980) ("The central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power.") (quotation omitted). As shown above, constitutional violations involving unconstitutional motive, which include discrimination and retaliation for the exercise of constitutional rights, are among the most flagrant abuses of official power. Plainly, the Congress that enacted the Civil Rights Act of 1871 did not intend to introduce any new immunity for government officials accused of such abuses. Thus, whatever the views of the plurality as to the wisdom of unconstitutional motive suits against public officials, the Congress manifestly did not intend to require plaintiffs bringing suits under § 1983 to prove unconstitutional motive by clear and convincing evidence.

<sup>8</sup> Indeed, for the first fifty years after its passage, § 1983 was primarily employed to redress discrimination against African Americans. See, e.g., *Lane v. Wilson*, 307 U.S. 268, 269, 276-77 (1939) (affirming judgment against officials who denied African Americans the right to vote); *Nixon v. Condon*, 286 U.S. 73 (1932) (reinstating discrimination claim against election officials); see generally Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277, 282-87 (1965).

**CONCLUSION**

For the reasons stated above, this Court should reject the clear-and-convincing evidence standard proposed by the plurality below.

Respectfully submitted,

JAMES E. ANKLAM  
DANIEL H. BROMBERG  
*(Counsel of Record)*  
JONES, DAY, REAVIS & POGUE  
1450 G Street, N.W.  
Washington, DC 20005  
(202) 879-3939

PAUL MICHAEL POHL  
IRA L. PODHEISER  
JONES, DAY, REAVIS & POGUE  
One Mellon Bank Center  
500 Grant Street  
31st Floor  
Pittsburgh, PA 15219  
(412) 391-3939

*Counsel for Amicus Curiae*  
*William G. Moore, Jr.*

August 14, 1997